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IN THE

Supreme Court of the United States

October Term, 1964

No. 725

JACOB MOLINAS,

Petitioner,

—v.—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

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The petitioner, Jacob Molinas, prays that a writ of certiorari issue to review the order of the Appellate Division, First Department, of the Supreme Court of the State of New York, entered on June 16, 1964, which unanimously affirmed the judgment of conviction rendered February 11, 1963, by the Supreme Court, New York County.

Opinions Below

The decision of the Appellate Division (Appendix A) is reported at 21 A. D. 2d 384. The decision of the Court of Appeals of the State of New York denying petitioner's application for a certificate granting leave to appeal to that Court (Appendix B) is not reported. The decision of Hon. Adrian P. Burke, Associate Judge of the Court of Appeals of the State of New York, reaffirming, upon reargu-

ment, denial of petitioner's application for a certificate for leave to appeal to the Court of Appeals (Appendix C) is not reported. The decision of the Appellate Division denying, without opinion, petitioner's motion for reargument (Appendix D) is not yet reported.

Jurisdiction

The order of the Appellate Division, First Department, was entered on June 16, 1964. An application to Hon. Adrian P. Burke, Associate Judge of the Court of Appeals, for a certificate for leave to appeal to the Court of Appeals was denied on July 27, 1964. A timely petition for reargument was thereupon filed with the Appellate Division on September 2, 1964 and was denied on October 15, 1964.*

The jurisdiction of this Court is invoked pursuant to 28 U. S. C. §1257(3).

Questions Presented

In 1960, the District Attorney of the County of New York initiated an investigation into the alleged bribery of college basketball players by persons seeking to control the scoring in games and thereby illicitly winning wagers on such contests. As it progressed, the investigation focused principally upon the activities of petitioner, Jacob Molinas, and three of his accomplices, namely Joseph Hacken, Joseph Green and Aaron Wagman. By the middle of 1961, these

* Rule XV of the Rules of the Supreme Court, Appellate Division, First Department, provides that "motions for reargument shall be noticed for the first, second or third motion day after the appeal has been decided". Petitioner's motion for reargument was filed on September 2, 1964 and returnable on Sept. 9, 1964, the third motion day following the Appellate Division's decision of the appeal.

three accomplices had been indicted as participants in the alleged conspiracy to "fix" games and they subsequently pleaded guilty to the charges against them. One of them, Aaron Wagman, agreed to and did cooperate with the authorities in their continuing investigation directed against petitioner, an investigation which, on May 15, 1962, culminated in the return of a five-count indictment against petitioner.

Theretofore, on January 16, 1962, during the course of the aforesaid investigation, petitioner was secretly interrogated in the absence of counsel. The interrogation was accomplished in the following manner: An accomplice, William Dennis Reed, who had previously retained petitioner as counsel, arranged to meet petitioner in the latter's law office, ostensibly to seek advice with respect to his own position in the investigation. In fact, the prosecutor had induced Reed to cooperate with the authorities and Reed had arranged the meeting at the prosecutor's suggestion. Acting as the agent of the prosecutor, Reed steered his conversation with petitioner to topics suggested by the prosecutor which were designed to elicit incriminating statements from petitioner. Petitioner's statements were recorded by means of an electronic device which the prosecutor had concealed upon Reed's person for that purpose.

At petitioner's trial, which was interrupted for 5 weeks during which time the jury was dispersed, the prosecution introduced in evidence, over objection, a tape-recording and typewritten transcript of Reed's conversation with petitioner. This furnished the element of corroboration of the accomplice testimony essential for petitioner's conviction under the law of New York.

The questions presented are:

1. In light of this Court's recent decisions in *Massiah* v. *United States,* 377 U. S. 201 and *Escobedo* v. *Illinois,*

378 U. S. 478, was the admission of the incriminating tape recording not violative of petitioner's Fifth and Sixth Amendment rights, as applied to state criminal trials by the Fourteenth Amendment, because the incriminating statements were deliberately elicited from petitioner by a secret agent of the prosecutor

a) after petitioner had become the primary target of the prosecutor's investigation,

b) in the absence of counsel and without prior warning of his constitutional right to remain silent, and

c) in such a manner that petitioner was not even aware that he was under interrogation?

2. Was the admission of the tape recording not violative of petitioner's Fourth Amendment rights, as applied to state criminal trials by the Fourteenth Amendment, because

a) it was the product of surreptitious electronic surveillance by an agent of the prosecutor

b) who had gained entry into petitioner's constitutionally inviolate private law office by misrepresentation

c) for the sole purpose of deliberately extracting incriminating statements from petitioner which, upon being recorded, would furnish the prosecution with the essential corroboration required to convict petitioner?

3. To the extent that this Court's decision in *On Lee* v. *United States,* 343 U. S. 747, may still have validity and suggests a negative answer to Question 2 above, should that decision not be overruled, as has heretofore been suggested by five Justices currently sitting on this Court, namely, Chief Justice Warren in his concurring opinion in

Lopez v. *United States,* 373 U. S. 427, 441, Justice Brennan, with whom Justices Douglas and Goldberg concurred, in his dissenting opinion in *Lopez* v. *United States,* 373 U. S. 427, 446, and Justice Black in his dissenting opinion in *On Lee* v. *United States,* 343 U. S. 747, 758?

4. After a criminal jury trial has been in progress for more than a month and almost 3,000 pages of testimony have been taken, does not its interruption for five weeks during which time the jury is dispersed and not subject to the control of the Court, so completely destroy the continuity of the trial and deprive petitioner of his constitutional right to due process of law and a fair trial, as to require, as a matter of constitutional law, the granting of his timely motion for a mistrial?

Statement

The District Attorney's intensive investigation of petitioner's activities in connection with the alleged bribery of college basketball players by persons seeking to control the scoring in games in which these players participated culminated, on May 15, 1962, in the return of a five-count indictment against petitioner. Count I of that indictment charged the crime of conspiracy under N. Y. Penal Law §580; Counts II, III and IV charged petitioner with bribing, on three separate occasions, one William Dennis Reed, a player on the basketball team of Bowling Green University, Bowling Green, Ohio, in violation of N. Y. Penal Law §382; Count V charged attempted subornation of perjury (N. Y. Penal Law §1632) in connection with Reed's appearance before the Grand Jury.

On January 8, 1963, petitioner was convicted on all counts of the indictment and, although a first offender, he was

nevertheless sentenced on February 11, 1963 to imprisonment for an aggregate term of 10 to 15 years.*

Petitioner's conviction was secured principally by the introduction of the testimony of the co-conspirator Wagman and the accomplice Reed; additional testimony was given by other basketball players who were also participants in the alleged conspiracy.

However, standing alone, all of this testimony was inadequate, as a matter of law, to warrant petitioner's conviction. This inadequacy stems from New York's statutory requirement (N. Y. Code Crim. Pro. §399) that the testimony of accomplices must be corroborated by other evidence. Since all of the witnesses referred to were involved in the conspiracy and were therefore accomplices, the conviction could not be obtained if corroboration were lacking.

In his attempt to supply the essential element of corroboration, the prosecutor, by means which, as shown at a later point, may be open to question, induced Reed to give his aid and assistance to the prosecuting authorities. To that end, he supplied Reed with an electronic recording device by means of which Reed surreptitiously obtained a tape recording of a conversation he had with petitioner on January 16, 1962, at a time when petitioner—to the knowledge of the District Attorney—was Reed's lawyer

* On October 19, 1964 petitioner applied to the sentencing-Court for a suspension of the execution of the 5 to 7½ year sentence imposed on his conviction on Count IV of the indictment, which sentence was to run consecutively with the 5 to 7½ year concurrent sentences imposed on Counts II and III. On November 9, 1964 the Supreme Court, New York County (Sarafite, J.), granted petitioner's motion to the extent of revoking the sentence previously imposed on Count IV and re-sentencing the petitioner *nunc pro tunc* to 2 to 5 years on said Count, which sentence was to run consecutive with the 5 to 7½ year sentences imposed on Counts II and III; thus petitioner must now serve an aggregate term of 7 to 12½ years.

of record. That this surreptitious recording was obtained solely for the purpose of supplying the legal requirement of corroboration is, in effect, conceded by the District Attorney in his brief to the Appellate Division where, on page 48, it is stated:

> "The taped conversation provided a major portion of the corroboration needed to substantiate legally the overwhelming, complete and detailed testimony of 9 college players and one co-conspirator, Aaron Wagman."

Petitioner's trial counsel objected to the introduction into evidence of this tape recording and a transcript thereof on the ground, among others, that its introduction violated petitioner's rights under the Constitution of the United States (1624*).

Whether the objection was well taken is one of the principal questions petitioner seeks to have this Court review.

The Manner in Which the Self-Incriminating Tape Recording Was Secured:

In January 1962, a detective approached Reed in Bowling Green, Ohio, and, after a conference with university officials, Reed agreed to return to New York with the officer and to appear before the Grand Jury (1483-4). Before leaving Ohio, however, Reed notified petitioner, at the time a member of the Bar of the State of New York, of the place and time of their scheduled arrival (1484-5, 1828-9). Reed had previously retained petitioner as his counsel (1468-70, 1795-7, 1991-2) to advise him with respect to his position in the investigation. He wished to confer with peti-

* All references, unless otherwise identified, are to pages of the original Record on Appeal to the Appellate Division, First Department, of the Supreme Court of the State of New York.

tioner with respect to his testimony before the Grand Jury (1828).

On the evening of January 15, 1962, petitioner met Reed and the officer at Newark Airport and, after petitioner telephoned the District Attorney's office, Reed accompanied petitioner to New York, where they spent the night in the Martinique Hotel in Manhattan (1491, 1830).

That evening Reed discussed the situation with petitioner and the latter advised him of his rights and informed him that he would accompany Reed to the District Attorney's office the following morning (1836). According to Reed (1492-4), petitioner also sought to influence Reed's testimony before the Grand Jury.

The following day petitioner appeared with Reed at the New York County District Attorney's office in his capacity as Reed's attorney. Petitioner was informed by the prosecutor that he would not be permitted to represent Reed. The prosecutor, Reed and petitioner thereupon went before Judge Dickens, of the then Court of General Sessions (1840), at which time the Judge suggested that it might be unethical for petitioner to represent Reed inasmuch as the investigation was directed against petitioner (1860; People's Exhibit 35, p. 20). According to Reed, petitioner was still attempting to show that he was entitled to represent him when "there was some commotion" (1860) and Reed was "taken away" by the prosecutor and detectives (1497, 1860). Although Reed desired counsel (1861), he was taken to the prosecutor's office for questioning and was not permitted to call petitioner (1859).

Reed was questioned for "a very long time" (1843) by at least 8 persons (1846) in connection with his participation in the basketball "fixing". Although Reed was without counsel during this questioning, he "assumed that Mr.

Molinas was still my lawyer, but at that time I was becoming quite unsure" (1840).

The District Attorney informed Reed that he would not be prosecuted if he cooperated and would testify against petitioner (1845, 1849). Nevertheless, throughout the initial stages of the protracted questioning, Reed took the position that he did not wish to make any statement (1848-9). He persisted in his refusal to make statements implicating himself or petitioner until, after more than six hours of questioning, he "broke down" (1849-50).

After several hours of interrogation, Reed was taken to the Legal Aid Society (1858-61). After a brief consultation with a Legal Aid attorney, Reed was questioned further and was given a "rather eloquent explanation of just what my circumstances were" by a member of the District Attorney's office (1862). Thereafter, he was granted immunity from prosecution and he agreed to cooperate (1853).

As noted above, however, Reed's testimony as an accomplice would have been legally insufficient to convict petitioner. Apparently recognizing the legal deficiency of their case against petitioner, the prosecuting authorities decided to have Reed meet with petitioner and, with the aid of an electronic recording device which they supplied to Reed, surreptitiously record a conversation during the course of which Reed would attempt to extract incriminating statements. As Reed testified,

> "They told me that this would be the best thing for me to do, to, in a way, make up for some of the things that I had done. Mr. Scotti [Chief Assistant District Attorney] explained that sometimes a person may do something and then comes a time when they feel like becoming penitent, if you will, and he told me it would

> be a good thing for me to go out and so, as much as I could, to help myself, to show that I was willing to cooperate as fully as I could" (1864).

Reed was thereupon equipped with a recording device concealed under his shirt, instructed in its use, and told to call petitioner and arrange for an immediate meeting at the latter's law office (1870, 1504). Reed agreed to cooperate because "there was no other way. I mean I was frightened" (2075).

The District Attorney suggested the type of conversation which Reed was to engage petitioner in, as well as the subjects to be covered (1865-7, 1876). Specifically, Reed was instructed to talk about perjury during his conversation and "to find out where Mr. Molinas would stand in the event I committed perjury" (1867). Of course, if Reed's trial testimony is to be credited, the District Attorney already knew petitioner's position on this matter for Reed had related to him the conversation of the preceding evening during which petitioner had allegedly attempted to suborn perjury.

Reed went directly from the District Attorney's office to petitioner's office and, in the guise of consulting him as his attorney with respect to his position in the investigation, Reed elicited incriminating statements from petitioner. The surreptitiously-made tape recording and the transcript thereof provided the corroboration required to convict petitioner on each of the five counts of the indictment.*

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* While petitioner may lack standing to complain of the prosecution's improper refusal to permit Reed to consult with counsel, the manner in which Reed was induced to cooperate and assist in the incrimination of petitioner is relevant for the light it sheds upon the prosecution's disregard of the rights of suspects and its illegal and improper course of conduct which culminated in the self-incriminating tape recording.

Reasons for Granting the Writ

1. In *Spano* v. *New York*, 360 U. S. 315, this Court reversed a state criminal conviction on the ground that, in the circumstances presented, it was error of constitutional dimensions to admit into evidence, over objection, a confession which the police deliberately elicited from the accused after indictment and in the absence of the accused's retained counsel. The majority found it unnecessary to decide whether the fact that the accused was interrogated after indictment in the absence of counsel, standing alone, was enough to render the confession inadmissible under the Fourteenth Amendment. Four Justices, however, believed that it was.

Shortly after *Spano*, the New York Court of Appeals held that a statement obtained from an accused after indictment in the absence of counsel, although not amounting to a confession, was nonetheless inadmissible as the product of testimonial compulsion (*People* v. *DiBiasi*, 7 N. Y. 2d 544). The *DiBiasi* case was soon followed by *People* v. *Waterman*, 9 N. Y. 2d 561, 565, where the Court held (in language quoted with approval by this Court in *Massiah* v. *United States*, 377 U. S. 201, 205):

> "Any secret interrogation of the defendant, from and after the finding of the indictment, without the protection afforded by the presence of counsel, contravenes the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with crime."

The New York Court of Appeals' expanding concept of the right to counsel next led it to hold inadmissible an otherwise voluntary statement made by an accused to a police officer after arraignment but before indictment

(*People* v. *Meyer*, 11 N. Y. 2d 162). The accused's failure to request counsel after being advised of his rights was held not to be a waiver of those rights (*People* v. *Meyer*, *supra*).

The protection afforded by the right to counsel was logically extended yet another step when it was held to encompass pre-arraignment statements elicited during interrogation in the absence of counsel at a time when the accused had become the principal suspect of the prosecution's investigation (*People* v. *Donovan*, 13 N. Y. 2d 148; *People* v. *Robinson*, 13 N. Y. 2d 296).

The *Robinson* case, *supra*, is factually similar to the case at bar. The accused, arrested on a sham vagrancy charge and questioned in connection with a homicide, steadfastly maintained his innocence. His co-defendant, however, had implicated him and the police placed an informer in a cell adjoining the accused and stationed two detectives hidden within hearing distance. The informer-agent engaged the accused in a conversation and extracted what amounted to a full confession of the homicide. At the accused's trial, the detectives were permitted to testify with respect to the incriminating statements they had overheard. This was held to be reversible error.

The expansion and development of the right to counsel found in the decisions of the New York Court of Appeals has its counterpart in the decisions of this Court (*Massiah* v. *United States*, 377 U. S. 201; *Escobedo* v. *Illinois*, 378 U. S. 478).

In *Massiah*, this Court held that incriminating statements deliberately elicited by Federal agents from petitioner after indictment and in the absence of counsel could not constitutionally be used as evidence against him. After Massiah had been indicted and released on bail, Federal

agents secretly secured the cooperation of his co-defendant Colson, and installed a concealed radio transmitter in Colson's automobile. Thereafter Colson and petitioner held a lengthy conversation while seated in Colson's parked automobile. By prearrangement with Colson and unknown to petitioner, an agent, stationed in another car parked some distance away, listened over the radio to the entire conversation. During the course of this conversation petitioner made several incriminating statements which were overheard by the agent. The agent was permitted to testify to these statements despite repeated objection by petitioner's trial counsel.

In reversing petitioner's judgment of conviction, this Court noted that the protection afforded by the right to counsel extends to "indirect and surreptitious interrogation as well as those conducted in the jailhouse. In this case, Massiah was more seriously imposed upon . . . because he did not even know that he was under interrogation by a Government agent" (377 U. S. at 206).

In the *Escobedo* case, *supra,* this Court noted, as did the New York Court of Appeals in *Donovan* that "no meaningful distinction could be drawn between interrogation of an accused before and after formal indictment" (378 U. S. at 486). Accordingly, it held the accused's right to counsel attaches as soon as the prosecution's investigation is no longer a general inquiry into an unsolved crime, but has begun to focus upon a particular suspect. Incriminating statements elicited from an accused during interrogation in the absence of counsel after the investigation has focused upon him are therefore constitutionally inadmissible.

We respectfully suggest that the District Attorney has not heeded the teachings of these cases. Rather, he continues to adhere to the investigatory procedure no longer condoned but which he extolled in his testimony given in

1955 before the Celler Congressional Committee investigating wire-tapping.* At that time, District Attorney Frank Hogan "credited wire-tapping with unearthing the large-scale corruption involving 35 top college basketball players who were fixing basketball games for pay" (Dash, Schwartz & Knowlton, "The Eavesdroppers", p. 37).

If the prosecution is still permitted to secure incriminating statements from an accused who is the primary target of its investigation by indirect and surreptitious interrogation, the force of this Court's decisions expanding and safeguarding the right to counsel would be nullified. Indeed, to sanction the practices of the prosecutor disclosed by the facts of the case at bar "would make the trial no more than an appeal from the interrogation; and the 'right to use counsel at the formal trial [would be] a very hollow thing [if], for all practical purposes, the conviction is already assured by pretrial examination'" (*Escobedo* v. *Illinois*, 378 U. S. 478, 487).

2. Whether the fruits of surreptitious electronic surveillance are admissible in a state criminal trial raises "grave constitutional questions under the Fourth and Fifth Amendments" (*Lopez* v. *United States*, 373 U. S. 427, 441 [Warren, *C.J.*, concurring in result]).

This Court was most recently confronted with these questions, in the context of an appeal from a federal con-

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* The District Attorney employed a technique virtually identical to that of the instant case in the recent bribery prosecution of Ralph Berger. In an account of the trial in the New York Times (November 5, 1964, p. 53, col. 2), it is noted that the trial judge instructed the jurors that the testimony of the principal witnesses for the State, who were accomplices, "would require independent corroboration" and that "to supply corroboration Assistant District Attorney Jeremiah B. McKenna had put several policemen on the stand and had played for the jury a tape recording of eavesdropped conversations in which Berger was a participant."

viction, in *Lopez* v. *United States,* 373 U. S. 427. A discussion of the *Lopez* case and the factors which distinguish it from the case at bar is relevant, however, since any constitutional bar to the admissibility of such surreptitiously obtained evidence would be equally applicable to state criminal trials (*Mapp* v. *Ohio,* 367 U. S. 643).

In *Lopez,* petitioner made an unsolicited bribe offer to an Internal Revenue agent who had entered his premises after the agent had given full notice of his authority and purpose—to investigate possible evasion or delinquency in the payment of federal taxes. Petitioner offered the agent $420 to "drop" the case. The agent initially declined to accept this money, but finally accepted it after petitioner's continued importunities. Petitioner asked the agent to return on a subsequent date. The agent promptly reported the conversation and his acceptance of the proffered bribe to his superiors, who instructed him to keep his appointment with petitioner and to "pretend to play along with the scheme". On his return visit to petitioner's place of business, the agent was equipped with a concealed recorder which he used to tape record his conversation with petitioner. At trial, the agent testified to his conversation with petitioner and the tape was introduced to corroborate this testimony. The majority of this Court rejected petitioner's contention that the admission of the recording thus secured was in violation of his rights under the Fourth Amendment.

Mr. Justice Brennan's dissenting opinion, concurred in by Justices Douglas and Goldberg, stressed the "intolerable anomaly" resulting from the fact that

> "while conventional searches and seizures are regulated by the Fourth and Fourteenth Amendments and wiretapping is prohibited by federal statute, electronic surveillance as involved in the instant case, which

poses the greatest danger to the right of private freedom, is wholly beyond the pale of federal law" (373 U. S. 427, at 471).

Accordingly, the dissenting Justices would have held that the admission of the fruits of surreptitious electronic surveillance violated the prohibitions contained in the Fourth Amendment and the "comprehensive right of privacy" secured to the individual by the interaction of the Fourth and Fifth Amendments.

In his separate opinion concurring in the result, Mr. Chief Justice Warren noted that he shared the dissenters' opinion that "the fantastic advances in the field of electronic communications constitute a great danger to the privacy of the individual; [and] that indiscriminate use of such devices in law enforcement raises grave constitutional questions under the Fourth and Fifth Amendments" (373 U. S. 427, at 441). He did not, however, share the dissenters' view that "all uses of such devices should be proscribed either as unconstitutional or as unfair law enforcement methods" (*Ibid.*). He found "nothing unfair" (*Id.*, at 442) in the procedure adopted because the agent had truthfully disclosed his authority and purpose before petitioner made the unsolicited bribe offer; the agent would have been free to testify as to the unsolicited offer; and the "only purpose the recording [of the subsequent conversation] served was to protect the credibility of Davis against that of a man who wished to corrupt a public servant in the performance of his public trust" (*Ibid.*).

The prosecution's tactics in the case at bar readily distinguish it from the *Lopez* case and are of the type condemned by the Chief Justice in his concurring opinion. Thus, in addition to the infringement of petitioner's right to counsel, discussed above, the following factors are significant:

The case at bar	*The Lopez case*
a) The agent-accomplice gained entry into petitioner's private office by deliberately misrepresenting his true purpose and purporting to seek advice with respect to his own involvement in the prosecution's investigation.	The agent truthfully disclosed that he was a federal agent conducting an investigation of petitioner's affairs.
b) The accomplice deliberately steered the conversation to topics suggested by the prosecutor, designed to elicit incriminating statements.	Petitioner made an unsolicited bribe offer to the agent.
c) But for the presence of the concealed recording device, petitioner took no risk in speaking freely to the accomplice-agent, since a conviction cannot be obtained in New York on uncorroborated accomplice testimony.	Petitioner risked prosecution and conviction by offering an unsolicited bribe to a federal agent, since the agent's testimony would have sufficed to convict.
d) The recording of incriminating statements deliberately elicited from petitioner was sought not to protect the credibility of the accomplice-agent, but to furnish the prosecution with the lacking essential element of corroboration required by the law of New York.	The "only purpose" of the recording was to protect the credibility of the federal agent.

A review of the instant case will afford this Court the opportunity to delineate more clearly the use, if any, which may constitutionally be made of surreptitiously obtained tape recordings of conversations between government

agents and an accused. A definitive statement by this Court is urgently needed since the tactics disclosed in the case at bar are apparently still in widespread use by prosecuting authorities.

3. In his dissenting opinion in *Lopez* v. *United States*, 373 U. S. 427, 447, Mr. Justice Brennan expressed his belief that this Court's decision in *On Lee* v. *United States*, 343 U. S. 747, was "error, in reason and authority, at the time it was decided; that subsequent decisions and subsequent experience have sapped whatever vitality it may once have had; [and] that it should now be regarded as overruled". Five justices sitting on this Court have expressed the same opinion.

To the extent, therefore, that this Court's decision in *On Lee* may still have validity and suggests that the surreptitiously obtained recording of petitioner's incriminating remarks is not a violation of his Fourth Amendment rights, we respectfully submit that it should be overruled for the reasons set forth so cogently in Mr. Justice Brennan's comprehensive dissenting opinion in the *Lopez* case, *supra*. A review of the instant case will place this issue, which has a vital effect upon law enforcement procedures generally, before the Court.

4. On Friday, November 30, 1962, after five weeks of trial and the taking of almost 3,000 pages of testimony, the Court recessed until the following Monday. Over the weekend the Trial Judge was stricken with a kidney stone attack and his subsequent hospitalization and period of recuperation prevented resumption of the trial until January 2, 1963. During this five-week interval the jury was dispersed and not under the control or guidance of the Court.

When the Court finally reconvened, and before any further testimony was taken, petitioner moved for a mistrial (2933-4, 2941) on the ground that continuation of this trial after such a long interruption would be fundamentally unfair and would deprive him of his constitutional right to due process of law and a fair jury trial. His motion was denied (2942).

On appeal, the Appellate Division held that "the mere lapse of time, without any evidence of any resulting prejudice under the circumstances of this case, did not give appellant the right to a mistrial as a matter of law, and it was no improvident exercise of discretion to deny the motion for a mistrial". This, we submit, was error of constitutional dimensions.

We submit that petitioner was not required to make any further showing of "resulting prejudice" beyond the five-week interruption of the trial. Such a long interruption during which the jury is dispersed so completely destroys the continuity of the trial as to require, as a matter of law, the granting of a motion for a mistrial.

However, there was, in fact, evidence of prejudice to petitioner. The day prior to the interruption, the People rested their case after the taking of almost 3,000 pages of testimony. The People's case consisted almost exclusively of accomplices' testimony, and the credibility of the witnesses was one of the principal issues submitted to the jury (3296).

The key to the issue of credibility lay in the jury's impression of the witnesses' demeanor on the stand, as well as their comparison of the testimony given during direct and cross-examination. The five-week interruption deprived petitioner of his right to be tried by a jury competent to evaluate the foregoing factors. The jury could not possibly have retained a clear and accurate recollection of the voluminous testimony, the nuances thereof and the

variations and inconsistencies appearing therein. Their impression of the witnesses must necessarily have dimmed, if not faded out altogether, during this period when they were permitted to once again resume their normal daily activities.

The question of constitutional law presented is a novel one and, while the custom and practice of many trial courts is to grant a mistrial under circumstances such as those presented by the instant case, there should be an expression of this Court on a matter so fundamentally affecting the rights of defendants in criminal jury trials.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

THOMAS R. NEWMAN
Counsel for Petitioner

APPENDIX "A"

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—v.—

JACOB MOLINAS,

Appellant.

First Department, June 16, 1964.

Crimes—bribery—defendant properly convicted of conspiracy, bribery and attempt to commit subornation of perjury in first degree upon proof of his activities in conspiracies to bribe and actual bribery of members of college basketball teams and attempt to induce witness to testify falsely—not improvident exercise of discretion to deny motion for mistrial when adjournment for five weeks was called because of illness of Trial Judge—sentence excessive but will not be reduced by Appellate Division (Code Crim. Pro., § 543) since sentences of co-conspirators are not before court.

1. The record demonstrates defendant's widespread activities in conspiracies to bribe, and the actual bribery of, members of college basketball teams to influence the outcome of games in which they participated. He also attempted, in the course of the investigation by the District Attorney's office, to induce one of the witnesses to testify falsely before the New York County Grand Jury. Defendant was properly convicted of the crimes of conspiracy, bribery and attempt to commit the crime of subornation of perjury in the first degree.

2. An adjournment during the course of the trial for a period of five weeks due to the sudden illness of the Trial Judge was not prejudicial and did not give defendant the right to a mistrial as a matter of law. It was not an improvident exercise of discretion to deny the motion for a mistrial.

3. The sentence, which aggregates 10 to 15 years, was excessive.

4. The Appellate Division has the power under section 543 of the Code of Criminal Procedure to reduce the sentence but the power will not be exercised in this case because the sentences of the co-conspirators are not before the court and they could not be reviewed or reduced proportionately. Nevertheless, defendant and his co-conspirators are not without a remedy. They may, if so advised, resort to executive clemency. Moreover, defendant, while serving the first of the consecutive sentences, may apply to the sentencing court to suspend execution of the second of the consecutive sentences.

APPEAL from a judgment of the Supreme Court rendered February 11, 1963 in New York County (JOSEPH A. SARAFITE, J.) upon a verdict convicting defendant of the crimes of conspiracy, bribery and an attempt to commit the crime of subornation of perjury in the first degree.

O. John Rogge of counsel (*William Sonenshine* with him on the brief; *Evseroff, Newman & Sonenshine*, attorneys), for appellant.

Alan Frederick Leibowitz of counsel (*H. Richard Uviller* with him on the brief; *Frank S. Hogan, District Attorney*), for respondent.

Per Curiam. Judgment of conviction unanimously affirmed. Defendant was convicted of the crimes of con-

spiracy (Penal Law, § 580) three counts of bribery (Penal Law, § 382) and an attempt to commit the crime of subornation of perjury in the first degree (Penal Law, § 1632). On two of the bribery counts, defendant was sentenced to 5 to 7½ years in prison, the sentences to run consecutively. On the third bribery count, a 5 to 7½-year sentence was imposed to run concurrently with one of the other bribery counts. A concurrent sentence of 1 year and 3 months to 2 years and 6 months was imposed on the count for the attempt to suborn perjury, and defendant received a 1-year suspended sentence on the conspiracy counts. The sum of the terms imposed thus aggregates 10 to 15 years.

The record amply supports the defendant's conviction. That record demonstrates appellant's widespread activities in conspiracies to bribe, and the actual bribery of, members of college basketball teams to influence the outcome of games in which they participated. In furtherance of the conspiracies, a player was paid either deliberately to cause his team to lose a game or to keep the winning margin of his team within a given number of points to permit persons —aware of the nefarious arrangement and betting on the outcome of the contest—to win on their wagers. The conviction on the charge of attempted subornation of perjury resulted from appellant's attempt, in the course of the investigation by the District Attorney's office, to induce one of the witnesses to testify falsely before the New York County Grand Jury.

The intensive investigation which preceded the trial and conviction revealed the corrupting influence of the appellant's multiple conspiracies reached many student players in colleges and universities throughout the country. It was also shown that appellant was the prime planner and guiding force of this widespread criminal operation which corrupted the players who participated and discredited the institutions of learning which they attended. Ten accom-

plices were brought to justice in the Supreme Court, New York County, while others were convicted in different States.

Appellant's assignments of error have been examined and found without merit. We shall allude only to the one claiming that an adjournment during the course of the trial for a period of five weeks due to the sudden illness of the Trial Judge was prejudicial error resulting in a termination of the prosecution on the ground of double jeopardy. There was no showing of prejudice resulting from the adjournment. Before any testimony was taken, the jury was instructed at length as to their conduct in court during trial and during recesses, and appellant has not demonstrated that those instructions were not followed. The jury was admonished by the Trial Judge in accordance with section 415 of the Code of Criminal Procedure, when the court recessed on Friday, November 30, 1962. Over the week end, the Judge was stricken and his illness prevented resumption of the trial until January 2, 1963. In the absence of proof to the contrary, the jurors are presumed to have obeyed the admonition and instructions of the court. The mere lapse of time, without any evidence of any resulting prejudice, under the circumstances of this case, did not give appellant the right to a mistrial as a matter of law, and it was no improvident exercise of discretion to deny the motion for a mistrial.

Appellant also urges that the sentence was excessive. While ample justification exists for the imposition of a substantial sentence in this case, and the sentence imposed was within the legal limits of the law, this court nevertheless is of the opinion that the sentence herein was unnecessarily excessive. Neither the detestible nature of the crimes of which defendant stands convicted, nor the widespread community revulsion they aroused, must divert the courts from the essential purpose of sentencing.

This court in *People* v. *Silver* (10 A. D. 2d 274, 276) expressed the view that the aim of a proper sentence was "not only to encompass the community's condemnation of the defendant's misconduct, but must also evaluate the possibilities of the rehabilitation of the defendant as a useful and responsible member of the community". Punishment less severe in the instant case would have been effective as a deterrent as well as a demonstration to defendant of the destructive folly of his criminal conduct.

This court has the power under section 543 of the Code of Criminal Procedure to reduce the sentence imposed to a sentence not lighter than the minimum penalty provided by law for the offenses of which the defendant has been convicted. (See *People* v. *Speiser*, 277 N. Y. 342.) This jurisdiction to extend mercy to a defendant will not, however, be exercised in the instant case. It may be assumed that, were it not for other related matters, this court would be inclined to modify the sentence herein. But, we are compelled to consider that defendant's accomplices—who had pleaded guilty to bribery and might therefore be eligible for more lenient treatment—would, were we to modify defendant's sentence, find themselves saddled with disproportionately heavy sentences.*

The judgments of sentence of the co-conspirators are not before this court and, therefore, we cannot review or reduce

---

* Joseph Hacken pleaded guilty to two counts of bribery. He was sentenced to 3 years and 9 months to 4 years on each count, the sentences to run consecutively, or an aggregate term of 7½ to 8 years in prison.

Joseph Green pleaded guilty to two counts of bribery and was given two consecutive 3 to 3½ years sentences, or an aggregate of 6 to 7 years in jail.

Aaron Wagman pleaded guilty to 38 counts of bribery, but because of co-operation with the authorities, he was sentenced, on only one count, to 3 to 5 years in prison. That sentence was suspended because Wagman had already been in jail in New York for two years, and was serving a sentence in Florida of 5 years in prison, as well as the imposition of a $10,000 fine.

them so as to arrive at proper proportionate sentences for the accomplices, were we to reduce appellant's sentence. Under the circumstances, a proper exercise of discretion requires that we do not, on this appeal, disturb the sentences imposed on appellant. Nevertheless, appellant and his co-conspirators are not without remedy. They may, if so advised, resort to executive clemency. Moreover, defendant while serving the first of the consecutive sentences may apply to the sentencing court to suspend execution of the second of the consecutive sentences although that court no longer has the power to make the second of such sentences concurrent with the first. (See *People* v. *Thuna*, 266 App. Div. 223.)

Breitel, J. P., Rabin, Valente, McNally and Stevens, JJ., concur.

Judgment of conviction unanimously affirmed.

APPENDIX "B"

STATE OF NEW YORK
COURT OF APPEALS

Before:

HON. ADRIAN P. BURKE,
Associate Judge.

CERTIFICATE DENYING LEAVE

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

—against—

JACOB MOLINAS,
Appellant.

I, ADRIAN P. BURKE, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above named appellant for a certificate pursuant to § 520 of the Code of Criminal Procedure, and upon the record and proceedings herein, there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at New York City, New York
July 7th, 1964

ADRIAN P. BURKE
Associate Judge

APPENDIX "C"

STATE OF NEW YORK
COURT OF APPEALS

(Emblem)

ADRIAN P. BURKE,

Judge.

July 27, 1964.

Thomas R. Newman, Esq.,
The Woolworth Building,
233 Broadway,
New York 7, New York.

Dear Mr. Newman:

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—VS.—

JACOB MOLINAS,

Appellant.

Your application for reargument, as you know, was granted, and after hearing you for the appellant, and the District Attorney for the People of the State of New York, respondent, I hereby reaffirm my denial of your application for a certificate for leave to appeal to the Court of Appeals.

I have considered the question you raised under the Constitution of the United States, that the introduction in evidence, over objection, of a tape recording of a conversation between appellant and the accomplice witness Reed, and the introduction in evidence, over objection, of the

transcript of said tape recording, violated appellant's rights under the Fifth, Sixth and Fourteenth Amendments, and find that such contention does not raise a question of law which ought to be reviewed by the Court of Appeals.

Very truly yours,

ADRIAN P. BURKE
Associate Judge

APPENDIX "D"

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 15th day of October, 1964.

Present:

Hon. Charles D. Breitel,
Justice Presiding,
" Benjamin J. Rabin,
" Francis L. Valente,
" James B. M. McNally,
" Harold A. Stevens,
Justices.

2

The People of the State of New York,
Respondent,

—vs.—

Jacob Molinas,
Defendant-Appellant.

The above named defendant-appellant having moved for leave to reargue his appeal from the judgment of the Supreme Court, New York County, rendered on February 11, 1963, which judgment was unanimously affirmed by order of this Court, entered on June 16, 1964,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the affidavit of Thomas R.

Newman in support of said motion, and the affidavit of Alan Frederick Leibowitz in opposition thereto, and after hearing Mr. Thomas R. Newman for the motion, and Mr. Alan Frederick Leibowitz opposed,

It is hereby unanimously ordered that the said motion be and the same is hereby denied.

Enter:

VINCENT A. MASSI
Clerk

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT

No. 725

Office-Supreme Court, U.S.
FILED
JAN 6 1965
JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term, 1964

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

JACOB MOLINAS,

Defendant-Petitioner.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FRANK S. HOGAN
District Attorney
New York County
Attorney for Respondent

H. RICHARD UVILLER
ALAN F. LEIBOWITZ
Assistant District Attorneys
Of Counsel

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Supreme Court of the United States

October Term, 1964

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

against

JACOB MOLINAS,
Defendant-Petitioner.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

This is a petition for a writ of certiorari to the Appellate Division of the State of New York, First Judicial Department, to review a decision of that Court, rendered June 16, 1964, unanimously affirming a judgment of the Supreme Court of the State of New York, rendered February 11, 1963 [21 App. Div. 2d 384 (1st Dept. 1964)].

Background

The petitioner was convicted on February 11, 1963, in the Supreme Court of the State of NewYork, County of New York, after a trial (SARAFITE, J. and a jury), of the crimes of CONSPIRACY (Penal Law §580), three counts of BRIBERY (Penal law §382), and an attempt to commit the crime of SUBORNATION OF PERJURY (Penal Law §1632). The

defendant was sentenced on bribery counts II and III to 5 to 7½ years in prison, the sentences to run concurrently. The sentence on bribery count IV was 5 to 7½ years in prison, the sentence to run consecutively with counts II and III. Petitioner was further sentenced for the attempt to suborn perjury to 1 year and 3 months to 2 years and 6 months, the sentence running concurrently, and on the conspiracy count, the court imposed a one-year suspended sentence.

On June 16, 1964, the Appellate Division unanimously affirmed the judgment of conviction [21 App. Div. 384]. On July 7, 1964, Judge Adrian P. Burke, Associate Judge of the New York Court of Appeals denied an application for leave to appeal to that Court. On July 27, 1964, after reargument, Judge Burke again denied leave to appeal to the Court of Appeals. On October 15, 1964, the Appellate Division denied a motion for reargument.

On November 9, 1964, the Supreme Court of New York (SARAFITE, J.) granted a motion to reduce the sentence by revoking the sentence previously imposed on count IV and re-sentencing petitioner *nunc pro tunc* to 2 to 5 years on that count, the sentence to run consecutively with the 5 to 7½ year sentences imposed on counts II and III.

Introduction

Jack Molinas was an All-American basketball player at Columbia University, and a professional player in the National Basketball Association. He was also an attorney admitted to practice in New York State. Such impressive

academic and athletic credentials, however, veiled an eager participation in a conspiracy of national scope and importance, the object of which was to corrupt the sport which had brought him fame.

Over a period of four years, from 1957 to 1961, Jack Molinas and his three partners, Aaron Wagman, Joseph Hacken, and Joseph Green, generated a conspiracy which controlled the outcomes of numerous college basketball games throughout the country. Scores, of course, were critical to those who wagered on the games. The whirlpool of dishonesty was further stirred by the greed of backers and players who, with the fixers, not only double-crossed each other but threatened to drown a nationwide program of college sports. Following an investigation initiated and conducted by the New York County District Attorney's Office, the extent of the scandal was fully revealed, and a series of prosecutions resulted in the conviction not only of the four fixers, but of backers and players such as Dave Goldberg, Steven Likometros, Paul Walker, Daniel Quindazzi, Jerry Vogel, Charles Tucker, Lou Brown, and Phillip Lacorte who profited from and encouraged Molinas and his confederates.

The trial of Molinas disclosed a major portion, but by no means the full extent, of the scandal. The record in this trial alone reveals that more than 17 college teams had the results of their games controlled by the desires of Molinas and his betting colleagues. Fully 34 players were solicited by them to influence scores, and at least 30 of the players accepted bribes. Many of the players were further induced to bring friends and teammates into the conspiracy in an effort to assure the effectiveness of the fixes, and expand

the scope of the enterprise. More than 48 games captured the interest of Molinas and his three partners and became the subjects of their venture, and at least 34 games were rigged, Molinas and his confederates being able to control games involving Alabama, Mississippi State, North Carolina, North Carolina State, South Carolina, Bowling Green, St. Josephs, La Salle, College of the Pacific, Tennessee, Niagara, Temple, Connecticut and Columbia. That other schools did not participate was not for want of effort by the fixers who constantly sought to procure as many college players as they could to perpetuate and strengthen the conspiracy. Not only was Green sent as an employee to summer camps to make contacts with players, but Molinas utilized his great athletic skill to inspire admiration among young basketball players, and then turned those who respected him into the pawns of the conspiracy. The fixed games were "sold" to gamblers located variously in St. Louis, Pittsburgh, Chicago, and New York, the whole forming an impressive conspiratorial network in which the tentacles of illegal gambling suffocated the ideals of university sports.

And finally, when the District Attorney's Office in New York began to probe the bribery scheme, Molinas attempted to insulate himself, not only by using his position as an attorney to represent those who might testify against him, but by inducing players to conceal the facts and perjure themselves before the grand jury. With poetic justice, however, the attempt to fix his contest with the authorities assured his own defeat, for two players, Gary Kaufman and Dennis Reed, equipped themselves with instruments to record Molinas' instructions.

Molinas was tried under a five count indictment, the first count, containing 72 overt acts, charging a conspiracy with other fixers and twenty-one college players. Counts II, III, and IV charged Molinas with bribing a Bowling Green basketball player, Dennis Reed, on three separate occasions during two seasons of play. And count V accused the defendant of attempted subornation of perjury, arising from inducements to Reed to testify falsely before the grand jury. Molinas was convicted after a lengthy trial and by overwhelming evidence on all five counts.

Questions Presented

1. Whether incriminating statements made before arrest by a lawyer, in an attempt to suborn the prospective grand jury testimony of a former conspirator cooperating with the district attorney, are inadmissible because of a denial of counsel.

2. Whether the same statements, recorded on a concealed tape recorder by the district attorney's agent, were obtained in violation of the Fourth Amendment.

3. Whether a 4½ week interruption in the trial, caused by the trial judge's illness, entitled the petitioner to a mistrial despite the fact that no specific prejudice was shown.

POINT I

Incriminating statements made by Molinas while attempting to suborn perjury were properly admitted into evidence [answering petitioner's Point 1, pp. 11-14].

By a rather ingenious combination of one feature from each of two many-faceted cases [*Massiah* v. *United States,* 377 U. S. 201 (1964) and *Escobedo* v. *Illinois,* 378 U. S. 478 (1964)], the petitioner asks this Court to reach the somewhat anomalous result of excluding statements made by a lawyer, during the commission of a crime, because counsel was not present. From the *Massiah* case petitioner takes the fact that the defendant made admissions to an accomplice in the employ of the police, and from *Escobedo* he seizes upon language permitting a police interrogation to be viewed as an accusatorial process. He then analogizes the instant case, and concludes that since suspicion had focused upon Molinas, he became accused, and the police could not question him, in the absence of counsel, through an agent.

One of the college basketball players bribed by Molinas was Dennis Reed, a player at Bowling Green University in Ohio. When the authorities began to unravel the details of the conspiracy, Molinas took steps to conceal his complicity, and in March 1961 he began to secure the cooperation of Reed to avert his capture. Over the ensuing months, Molinas made two trips to Ohio to speak to Reed in person, as well as maintaining contact with him by telephone, Molinas instructing the player to reveal nothing,

but if called before the grand jury to lie about the crimes. Molinas also told Reed to retain counsel, and had Reed write a letter to him asking the petitioner to serve as Reed's attorney, Reed writing the letter as Molinas dictated it. In January, 1962, Reed was brought to New York to appear before the grand jury, and again Molinas instructed him to deny he had ever received money to fix games from Molinas. Reed, however, after consulting with Legal Aid attorneys, decided to cooperate with the district attorney, and agreed to carry a recording device on his person. Reed then telephoned Molinas and was invited to the defendant's law office. There, Reed recorded a conversation in which the defendant instructed him how to lie to the grand jury without risking exposure, and further briefed him on the specific facts that Reed was to deny or not to remember.

In *Massiah* the Court found that the defendant was deprived of his right to counsel where, after indictment, statements were elicited from him by an accomplice, cooperating with the police, and recorded for use in evidence. As the Supreme Court made clear, the decisive factor was that Massiah had already been indicted when the statements were taken, and "an indicted defendant under interrogation by the police in a completely extrajudicial proceeding" must have the aid of counsel. The use of an accomplice, at a time when the police could not freely question the indicted man, was viewed as an indirect means of accomplishing something that could not be done directly. Clearly, of course, Molinas, who had not even been arrested, is not in the same position as an indicted defendant, and as the police could freely question Molinas, so too could they use an agent.

Nevertheless, the petitioner seeks to replace the defect in the analogy with *Massiah*—an unindicted Molinas—with a curious interpretation of *Escobedo*. In *Escobedo* the Supreme Court suggested that an interrogation of a defendant may convert a general investigation into a virtual accusation. The petitioner extends this observation to read that when suspicion focuses upon a suspect, he is entitled to a lawyer, and the failure to provide him with one, or to warn him of his right to counsel, renders any statements made inadmissible. However, such a view is a complete misreading of the holding of *Escobedo*. Indeed, Escobedo is a case quite specifically confined to its own facts, as the twice enunciated holding makes clear. In *Escobedo* the defendant was arrested. He was subjected to a lengthy five hour interrogation with his sister being held as a virtual hostage until he confessed. He requested a lawyer, and was denied a lawyer. Moreover, his counsel attempted to see him during the interrogation, and was kept cooling his heels while the police extracted a confession. Thus, stated simply, *Escobedo* holds, as does *People* v. *Donovan* [13 N. Y. 2d 148 (1963)] that a suspect may not be denied access to counsel who is attempting to see him.

The *Molinas* case is distinguishable in every material aspect. Molinas was not arrested. He was not subjected to a lengthy interrogation. No lawyer was sidetracked from seeing him. He asked for no lawyer, nor was he denied one. Indeed, the fact that Molinas was himself a lawyer is of prime importance. In *Escobedo* the Court distinguished the case of *Crooker* v. *California* [357 U. S. 435 (1957)] where a contrary result was reached on the same issue, by citing two "critical circumstances" dif-

ferentiating the cases. One of these crucial factors was Crooker was "a well-educated man who had studied criminal law while attending law school for a year," while Escobedo was a "22-year-old of Mexican extraction with no record of previous experience with the police."

Not surprisingly, the petitioner's conclusion that a lawyer is required once suspicion focuses leads to a result obviously far beyond anything contemplated in the *Escobedo* case or in any other case. In the present context, it means that Molinas was entitled, as a matter of constitutional law, to counsel during the commission of a crime itself. For the instructions given by Molinas to Reed constituted the crime of attempted subornation of perjury, and the defendant was duly convicted on that charge.

POINT II

The tape recording and its admission into evidence did not offend Fourth Amendment protections [answering petitioner's Points 2 and 3, pp. 14-18].

Attacking the tape recording from another direction, petitioner suggests that it was obtained and introduced into evidence in violation of the Fourth Amendment. However, two insurmountable roadblocks prevent success: *On Lee* v. *United States* [343 U. S. 747 (1952)] and *Lepez* v. *United States* [373 U. S. 427 (1963)], cases almost directly in point.

In *Lopez* an agent of the Internal Revenue Service, Davis, discovered a tax evasion scheme being perpetrated

by the defendant in connection with an inn he operated. Lopez, however, offered a bribe to the agent, and, after Davis accepted some money, they agreed to another meeting to discuss the details. Davis reported the bribe to his superior and, equipped with a portable wire recorder, again met with Lopez in his office at the inn. The conversation was recorded and later used in evidence to supplement Davis' testimony at the trial. This Court held the evidence admissible, pointing out that Davis' misrepresentation to go along with the bribe attempt did not affect the defendant's consent to invite him into his office to talk. Particularly, this Court found no illegality in recording a talk in which the government agent was a participant. The instant case is comparable. Reed, whose testimony Molinas attempted to suborn, first told his story to the authorities, was equipped with a tape recorder, telephoned Molinas and was invited to his office, and then recorded the conversation. Petitioner, however, lists four factors which he feels distinguish this case from *Lopez*. No relevant distinction is shown in any of these contentions.

First, it is stated that Reed misrepresented his true purpose by purporting to seek advice regarding his involvement and thereby gained entrance into Molinas' office. The same, of course, is true in *Lopez,* Davis misrepresenting his intentions in order to record a conversation covering the bribe attempt. While petitioner adds that Davis never concealed that he was investigating Lopez' affairs, he overlooks the fact that by the time of the second conversation, the one which was recorded, Davis, in order to take down admissions of bribery, led the briber to believe that the investigation had been successfully sidetracked.

Similarly, Reed, whose testimony was sought to be suborned on numerous previous occasions by Molinas, went back with the tape recorder to draw the conversation to the facts of the attempted subornation, as well as the bribery and conspiracy in which he had been allied with the Molinas. Of course, the feigned willingness of both Davis and Reed to go along with the schemes in neither case affects the willingness of Lopez or Molinas to invite them to private conversation to continue subverting them. Such a misrepresentation is thus irrelevant to the constitutional claim.

Secondly, it is argued that Reed deliberately steered the conversation to topics designed to elicit incriminating material. Petitioner's suggestion that the same was not true in *Lopez* is erroneous, Davis specifically being instructed to steer the conversation to the initial offer of the bribe [373 U. S. at pp. 430-2]. Lopez's unsolicited bribe offer, which petitioner cites, was made first at the unrecorded interview and its repetition was encouraged at the recorded one. Similarly, Molinas had previously made unsolicited attempts to have Reed conceal Molinas' part in the scheme, and these were later solicited for recording.

The third and fourth efforts to distinguish *Lopez* are related, petitioner arguing that the purpose of the tapes made by Reed was to secure corroboration as a legally necessary element for a New York prosecution, while in *Lopez* it was to secure corroboration only to bolster credibility. Conversely, Molinas took a limited risk in talking with Reed, while Lopez risked prosecution, corroboration not being required to convict him in the Federal courts.

Of course, the purpose of recording Reed's conversation was obviously not only to obtain corroboration as a legal element, but also, as in *Lopez*, to confirm his story and support his credibility. Moreover, since it is perfectly proper to use a tape recording to corroborate testimony, it cannot then become improper to use it simply because a particular jurisdiction deems such corroboration necessary rather than helpful to the prosecution's case. As the opinion in *Lopez* pointed out:

> Stripped to its essentials, petitioner's argument amounts to saying that he has a constitutional right to rely on possible flaws in the agent's memory, or to challenge the agent's credibility without being beset by corroborating evidence that is not susceptible of impeachment. For no other argument can justify excluding an accurate version of a conversation that the agent could testify to from memory. We think the risk that petitioner took in offering a bribe to Davis fairly included the risk that the offer would be accurately reproduced in court, whether by faultless memory or mechanical recording [at p. 439].

Indeed in his concurring opinion, Chief Justice Warren viewed such corroboration as a correct use of the evidence, by distinguishing *Lopez* from *On Lee* where the electronic device was used "not to corroborate testimony of Chin Poy [the undercover agent], but rather to obviate the need to put him on the stand" [at p. 440], a circumstance not present in this case.

In sum, then, there is no reason to exclude the highly probative and competent evidence obtained by Reed, since no illegality accompanied its acquisition. Reed was law-

fully on the premises, the recording violated no statute, it was not a conversation which could not have otherwise been overheard, the district attorney's agent was a participant in the talk, and he testified at the trial.

Finally, forsaking even weak efforts to distinguish controlling authority, petitioner seeks to have *On Lee* v. *United States* [343 U. S. 747, *supra*] overruled: he thereby acknowledges implicitly that that decision dooms his cause. However, the instant use of evidence is as much controlled by *Lopez* as it is by *On Lee*, a circumstance obviating any need to reconsider *On Lee*. In addition, as pointed out in the concurring and dissenting opinions in *Lopez*, *On Lee*, a sound result when announced, was impliedly affirmed just one year ago.

POINT III

The hiatus of one month, in the trial, occasioned by the illness of the trial judge did not entitle the petitioner to a mistrial [answering petitioner's Point 4, pp. 18-20].

On Friday, November 30, 1962, after five weeks of trial amounting to 2,907 pages of the trial record, the court recessed until the following Monday, Judge Sarafite admonishing the jury in compliance with Section 415 of the Criminal Code. Over the weekend, the judge was stricken with a kidney stone attack and his hospitalization prevented resumption of the trial for four and a half weeks, until Wednesday, January 2, 1963. During this interval, the trial was adjourned several times, although the jury was not reconvened for these motions.

The intermission occurred during the defense presentation, a day and a half after the close of the People's case. Following the resumption, one day was required to complete the testimony, the defendant putting one witness on the stand, the People countering with one rebuttal witness; both sides then rested. The petitioner now pounces upon this delay, and seeks to fashion a claim of prejudice from it. Specifically, it is argued that the separation so prejudiced Molinas that a mistrial should have been granted. However, the vacuum in the trial proceedings provides no material for forging such a *deus ex machina.*

Despite the four week interim, it is highly unlikely that the jury's memory of the facts suffered appreciably. The five weeks of prior testimony, covering the same events again and again on direct and cross-examination, and related by many witnesses to the same events through their own participation, must have considerably reinforced the major facts so that they would not be forgotten. Of course, specific dates and places may not have been accurately recalled, but such forgetfulness in no way prejudices the defendant.

Indeed, the petitioner's argument is somewhat strange in view of the evidence presented. For the better the memory retained by the jury of the People's case, the more disadvantageous it would be to the defendant; time could only blunt the edge of the evidence against him, reducing its effectiveness. [See, *LaPage* v. *Trebirge*, 89 A. 2d 534 (N. H. Sup. Ct. 1952) where the court recognized that a 12 day delay, before the opening of the defense case, would be prejudicial to the prosecution.] And although the petitioner asserts that the nuances of credibility developed

through cross-examination were lost by the hardening of impressions during the interval, nevertheless it is just as likely that the nuances would have remained part of the over-all impression formed.

In addition, even had the hiatus dissipated the jury's ability to cope with the issues, Judge Sarafite, upon resumption of the case, presented every opportunity to allow both sides to resharpen their points, and to allow the jurors to refresh their recollections. The defense was permitted to read to the jury any portion of the record which it was felt necessary to recall. The jurors themselves were told that they could have any testimony reread, and, in fact, they interrupted their deliberations to avail themselves of this opportunity (Mins. of Trial, pp. 3389, 3394, 3399). The court also emphasized to both parties that summations could be as lengthy as necessary in view of the circumstances. Moreover, the recapitulation of the testimony during both closing addresses, and in the court's marshalling of the evidence, provided ample means to recall the evidence into focus, had it become blunted by time. And the fact that the jury deliberated for nine hours, and asked pertinent questions, indicates a calm and deliberate attention to all the evidence in the case.

To further imply that the jury might have been improperly influenced during the hiatus not only trammels on the most basic tenets of the jury system, by suggesting the disregard of clear instructions by the jury, but is an assumption based totally on unfounded speculation. Thus it has been universally and necessarily held that in the absence of a showing to the contrary the jurors are presumed to have obeyed the admonition and instructions of the

court [*State* v. *Williams*, 192 La. 713, 189 So. 112 (1939); *State* v. *Fouts*, 79 Ohio App. 255, 72 N. E. 2d 286 (1947), *cert. denied* 331 U. S. 853 (1947); *State* v. *Burns*, 79 Utah 575, 11 P. 2d 605 (1932); *Hile* v. *State*, 54 Okla. Crim. 137, 15 P. 2d 1049 (1932); *Lutwak* v. *United States*, 344 U. S. 604, 617-19 (1953); *Oper.* v. *United States*, 338 U. S. 84, 94-5 (1954); *Blumenthal* v. *United States*, 332 U. S. 539 (1947); *Delli Paoli* v. *United States*, 352 U. S. 232, 242 (1957); *People* v. *Gowasky*, 244 N. Y. 451, 464 (1927); *People* v. *Barnes*, 202 N. Y. 77, 85 (1911)]. In *Fouts* the Ohio Court stated:

> Unless and until the contrary is shown of record, we are required to adhere to the well established principle of law that it is presumed that the jurors obeyed the instructions and admonitions of the court

Indeed, although more protracted, the delay occasioned by the judge's illness differs only in degree from the many evenings and weekends that the jurors spent at home during the course of the trial. Moreover, during the greater part of the hiatus, there was little opportunity for publicity concerning the case, all the newspapers in the city being then on strike, and the absence of testimony during the hiatus itself providing no news for broadcast or publication.

Furthermore, under the circumstances, it would have been a terrible miscarriage of justice to have granted the motion for a mistrial, for the prejudice to the People would have been enormous. The prosecution assembled twenty-four witnesses, many of whom traveled great distances to attend, Reed, for instance, being brought in from Germany, and Falantano from Alaska. In addition, a protracted trial works a considerable hardship on the jurors involved. More than a full panel of 150 jurors was exhausted in se-

lecting the talesmen and their four alternates. Moreover, with the end of a long trial in hand, only one more day of testimony being required, it would have been a grave error to set aside the work of all concerned because of the misfortune befalling the judge. Surely, unless convincing evidence is shown that the delay prevented the defendant from receiving a fair trial—and no such proof appears—it cannot be an abuse of discretion for the judge to deny a new trial.

In the few cases reported, where lengthy delays were necessitated, new trials were denied unless prejudice was convincingly shown. In *Ossenkop* v. *State* [86 Neb. 539, 126 N. W. 72 (1910)] several defense witnesses contracted smallpox in the midst of the trial and had to be quarantined for at least 10 days. The case was adjourned and the jury admonished and released. On appeal it was held that a motion for a mistrial was properly denied, the court stating:

> That any juror disregarded this admonition of the court is not suggested by the record * * * The conduct of the jurors has not been impeached * * * There is nothing to show that any member of the jury was subjected to improper influences during the intermission * * * In allowing them to separate, neither abuse of discretion on the part of the trial court nor prejudice to defendant is shown by the record.

In *Sullivan* v. *Aliquippa and S. R. Co.* [57 F. Supp. 353 (WD Pa. 1944)] the illness of the judge after a week of the trial required a four week separation of the jury. Despite the court's declaration that a continuance would usually be inappropriate, the defendant was unable to do more than cite the lapse of time, and the motion for a mistrial

on the grounds of prejudice was thus held to have been properly denied.

Accordingly, separation being required by the illness of the judge, and no evidence existing of any resultant prejudice, and the protracted trial being almost complete, it cannot have been an abuse of discretion to deny the motion for a mistrial. Indeed, as stated in the Appellate Division's opinion, "The mere lapse of time, without any evidence of any resulting prejudice, under the circumstances of this case, did not give appellant the right to a mistrial as a matter of law, and it was no improvident exercise of discretion to deny the motion for a mistrial." [21 App. Div. 2d 384 (1st Dept. 1964)].

Consequently, the mere lapse of time could hardly have infected the trial with a disability of constitutional dimension.

Conclusion

The petition for writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 725

JACOB MOLINAS,

Petitioner,

—v.—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Introduction

In his "Statement" (Petition, pp. 5-10) petitioner has set forth in detail, and with complete record references, the facts with respect to the manner in which the District Attorney induced Reed to cooperate and the surreptitious manner in which the self-incriminating tape recording was obtained. Respondent apparently concedes the truth of all of the facts in petitioner's "Statement", for he has not challenged or disputed any fact or reference recited therein.

Respondent's "Introduction" (Resp. Br., pp. 2-5) deals solely with the irrelevant facts of the substantive nature of the crimes with which petitioner was charged. It omits entirely any reference to the facts which are relevant to a

consideration of the important questions of criminal procedure and constitutional law presented by this application.*

As this Court has observed, however, "The history of liberty has been largely the history of observance of procedure safeguards" (*McNabb* v. *U. S.*, 318 U. S. 332, 347).

Since petitioner's constitutionally guaranteed rights are in nowise lessened by reason of the nature of the crime which he is charged to have committed, an extended reply to respondent's tactic is unnecessary. We merely point out, however, that it was obviously intended to divert this Court's attention from respondent's own illegal and improper conduct and respondent's violation of petitioner's constitutional rights.

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* At p. 7 of Respondent's Brief, respondent cavalierly dismisses the entire subject with the brief misleading assertion that: "Reed, however, after consulting with Legal Aid attorneys, decided to cooperate with the district attorney, and agreed to carry a recording device on his person. Reed then telephoned Molinas and was invited to the defendant's law office."

POINT I

Petitioner's Fifth and Sixth Amendment rights, as applied to state criminal trials by the Fourteenth Amendment, were violated by the admission in evidence of the surreptitiously obtained incriminating tape recording.

[Answering Resp. Point I, pp. 6-9]

We take the liberty of replying briefly to the following assertions of respondent:

(1) *Respondent asserts:* "Clearly, of course, Molinas, who had not even been arrested, is not in the same position as an indicted defendant, and as the police could freely question Molinas, so too could they use an agent" (Resp. Br., p. 7).

Petitioner's comment: This statement begs the very question presented for the Court's consideration. We submit that the police were not at liberty to question petitioner, directly or through the use of a secret agent, in the absence of counsel (*Escobedo* v. *Illinois,* 378 U. S. 478; *People* v. *Donovan,* 13 N. Y. 2d 148).

(2) *Respondent asserts:* "Molinas was not arrested. He was not subjected to a lengthy interrogation. No lawyer was sidetracked from seeing him. He asked for no lawyer, nor was he denied one" (Resp. Br., p. 8).

Petitioner's comment: While petitioner was not arrested, he was concededly the prime target of the prosecutor's investigation, which was clearly accusatory in nature. That petitioner's rights were not violated because the interrogation was not "lengthy" is patently specious. Obviously, petitioner did not request the presence of his counsel be-

cause "he did not even know that he was under interrogation by a Government agent" (*Massiah* v. *U. S.*, 377 U. S. 201, 206). Moreover, "where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request" (*Carnley* v. *Cochran*, 368 U. S. 506, 513). As the Supreme Court of California has recently held in *People* v. *Dorado*, 40 Cal. Rptr. 264, 268: "We find no strength in an artificial requirement that a defendant must specifically request counsel; the test must be a substantive one: whether or not the point of necessary protection for guidance of counsel has been reached."

(3) *Respondent asserts:* ". . . the fact that Molinas was himself a lawyer is of prime importance" (Resp. Br., p. 8).

Petitioner's comment: Respondent obviously does not concur with the adage that "a lawyer who represents himself has a fool for a client." In any event, although petitioner was a member of the bar, he did not practice criminal law and was entitled to advice from a specialist in this field.

POINT II

The petitioner's Fourth Amendment rights, as applied to state criminal trials by the Fourteenth Amendment, were violated when the agent of the prosecutor gained entry into petitioner's private office by misrepresentation for the purpose of extracting self-incriminating statements from the petitioner which were recorded on a concealed tape recorder.

[Answering Resp. Point II, pp. 9-13]

We respectfully refer the Court to our previous discussion at pp. 14-18 of the "Petition" and, particularly, to p. 17, where a comparison of the case at bar with the *Lopez* case appears.

Since five Justices of this Court have expressed the view that *On Lee* v. *U. S.*, 343 U. S. 747, was erroneously decided and should no longer be regarded as controlling authority, we respectfully submit that it should now be overruled. This Court has not hesitated to overrule its prior decisions when the preservation of a defendant's constitutional rights so requires (*Mapp* v. *Ohio*, 367 U. S. 643; *Gideon* v. *Wainwright*, 372 U. S. 335; *Malloy* v. *Hogan*, 378 U. S. 1).

POINT III

Where a criminal jury trial has been in progress for more than a month and almost 3,000 pages of testimony taken, its interruption for five weeks, during which time the jury is dispersed and not subject to the control of the Court, so completely destroys the continuity of the trial as to deprive petitioner of his constitutional right to due process of law and a fair trial, and it was error not to grant his timely motion for a mistrial.

[Answering Resp. Point III, pp. 13-18]

In his brief in opposition (p. 16), the District Attorney urges that "although more protracted, the delay occasioned by the judge's illness, *differs only in degree* from the many evenings and weekends that the jurors spent at home during the course of the trial (emphasis added). Surely, if instead of a five week interruption, this trial had been delayed for six months or for one year, even the District Attorney would no longer suggest that this was a mere difference "only in degree" from overnight and weekend adjournments.

Obviously, at some point a sufficiently great difference quantitatively becomes a difference qualitatively. It is essential that this Court consider this question and state at what point the interruption of a criminal jury trial becomes so prejudicial to the defendant by the mere lapse of time that a mistrial must be granted as a matter of constitutional law.

It is no answer to say, as does the District Attorney (Resp. Br., p. 15), that the prejudice which resulted from the long interruption was eliminated by defense counsel's opportunity "to read to the jury any portion of the record which it was felt necessary to recall" and the fact that counsel's summation "could be as lengthy as necessary in

view of the circumstances." To adequately insure petitioner's right to due process and a fair trial, the jury would have had to be presented with virtually all of the prior testimony. Short of a new trial, this would have been impossible. Additionally, as petitioner's trial counsel noted at the time of his motion for a mistrial (2924-25):

> "Mr. Evseroff: I intend to sum up, Your Honor, but unfortunately it is not possible for me to go over each and every nuance and inference created in cross-examination with respect to the questions, with respect to the answers, with respect to the manner in which the witnesses answered; for one very good reason: I do not have the minutes, and I do not have the minutes because when I asked my client to buy the minutes, he told me he could not afford to."

Finally, the cases cited by the District Attorney at p. 17 of his brief, are clearly inapt, and his discussion of these cases conveys a completely misleading impression of their actual holdings.

In *Ossenkop* v. *State,* 86 Neb. 539, 126 N. W. 72, the adjournment occasioned by the fact that several of the defendant's witnesses were quarantined on account of smallpox, occurred four days after the commencement of the trial and not, as here, after five weeks of testimony. Moreover, as appears at p. 76, the Court informed the jurors of the reason for the postponement and admonished them at great length with respect to the gravity of the situation and their responsibilities. In the instant case, the jurors were excused with the perfunctory admonition, "Do not talk about the case. Do not form or express any opinion. You may retire" (2906).

In *Sullivan* v. *Aliquippa & S. R. Co.,* 57 F. Supp. 353, *a civil case,* the continuance necessitated by the Trial

Judge's illness *was agreed to* by both counsel. With respect to the granting of such a continuance, the Court noted (p. 354) that:

> "Such a procedure should not be followed generally. It should be done only in cases where the facts are of such a nature as to require the same to be done; and even then, *it should not be done if either side would be prejudiced thereby or unless the parties and the Court approve of such a course*" (emphasis added).

CONCLUSION

For the reasons stated herein and in the petition heretofore submitted, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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